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No. 90-918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHRISTINE FRANKLIN,
Petitioner,
v.
GWINNETT COUNTY SCHOOL DISTRICT and
WILLIAM PRESCOTT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a private party may recover compensatory damages for an intentional violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*

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This *amicus curiae* brief is submitted by the Lawyers' Committee for Civil Rights Under Law in support of petitioner Christine Franklin. By letters filed with the Clerk, petitioner and respondents have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The Lawyers' Committee is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar in the effort to ensure civil rights for all Americans. As part of this effort, the Lawyers' Committee has participated as *amicus curiae* in two previous Title IX cases before this Court, *Cannon v. University of Chicago*, 441

U.S. 677 (1979) and *Grove City College v. Bell*, 465 U.S. 555 (1984). It also has represented parties or participated as *amicus curiae* in numerous cases arising under other federal antidiscrimination laws and under the Constitution.

This case raises an important issue concerning the relief available under Title IX, and the Court's decision may also affect the remedies available under Title VI of the Civil Rights Act of 1964—which served as the model for Title IX. Because the Lawyers' Committee frequently represents victims of race discrimination in litigation under Title VI, it has a particular interest in urging principles that will result in the sound application of Title VI, and in the resolution of any uncertainty as to whether the federal courts may provide full relief to victims of intentional race discrimination in federally assisted programs.

SUMMARY OF ARGUMENT

This case concerns a core judicial function—the award of remedies to implement a federal statutory cause of action. Petitioner has an unquestioned right under Title IX of the Education Amendments of 1972 to be free from sex-based discrimination in a federally assisted educational program. She has an equally unquestioned right to sue to redress an intentional violation of that right. The issue presented is whether the federal courts are disabled from providing compensatory damages as a means of such redress.

The federal courts have power to provide the relief requested. Nothing in the text of Title IX, its legislative history, or its animating purposes suggests that the courts have been denied that power. No circumstances exist here to displace the usual rule that all available remedies may be employed to vindicate federal rights. *Bell v. Hood*, 327 U.S. 678, 684 (1946). Indeed, that rule

applies with particular force where, as in this case, the choice is "damages or nothing."

Just as nothing in Title IX or its legislative history restricts the federal courts' familiar remedial powers, nothing in the Eleventh Amendment or principles derived from it requires that compensatory damages be withheld for intentional violations of Title IX. In *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981), this Court held that Congress must speak clearly when it seeks to create rights that are enforceable against the States. And in *Guardians Ass'n v. Civil Service Comm'n of New York*, 463 U.S. 582 (1983), two members of the Court found *Pennhurst* to support the denial of retroactive relief in an action against a public entity other than a State, where unintentional discrimination was alleged.

Pennhurst is satisfied here. Title IX speaks clearly and unambiguously; it creates enforceable rights, not a mere "nudge in the preferred direction." Having accepted an obligation not to discriminate, and having willfully violated that obligation, a recipient of federal funds should make good the injury done. Any doubt that Eleventh Amendment principles allow an award of damages against a public entity in these circumstances was explicitly removed by Congress when, in 1986, it reaffirmed the federal courts' authority to provide "remedies both at law and in equity" in Title IX actions against the States. 42 U.S.C. § 2000d-7 (1988).

ARGUMENT

Petitioner has alleged that she suffered intentional discrimination on the basis of sex at the hands of Respondents, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1988). This case presents the question whether, if she proves her case, she may recover compensatory damages.[1] Congress did not expressly create a private cause of action when it enacted Title IX, and did not express a preference that certain forms of individual relief be available or unavailable. Congress did, however, establish an enforceable right for the benefit and protection of a defined class; and this Court has held that the statute therefore gives an implied cause of action to an injured member of that class. *Cannon v. University of Chicago*, 441 U.S. 677, 689, 717 (1979). This Court routinely has held that, where such a federal right has been invaded and a cause of action exists, "federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946).

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[1] References in the brief generally will be only to Title IX, the statute under which this case arises. This Court, however, has construed the remedial provisions of Title IX, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1988), and Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (1988) to be related. *See Cannon v. University of Chicago*, 441 U.S. 677, 694-96 (1979); *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 600 n.4 (1986); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 626, 630 & n.9 (1984); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 529 (1982). Thus, whether compensatory damages are available under Title IX may bear strongly on whether such damages are available under Title VI and Section 504. In addition, cases construing either Title VI or Section 504 aid in the interpretation of Title IX.

I. UNDER THE LAW AS STATED IN *BELL v. HOOD*, COMPENSATORY DAMAGES ARE AVAILABLE TO A PRIVATE PLAINTIFF WHO PROVES AN INTENTIONAL VIOLATION OF TITLE IX.

Long ago, this Court held that, "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted); *see Davis v. Passman*, 442 U.S. 228, 245-47 (1979); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239-40 (1969). The rule of *Bell v. Hood* is grounded in the bedrock principle that, where federally protected rights have been invaded, a federal court may give an appropriate decree or award that will make the plaintiff whole. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (unless there are particular factors that "exclude the injured party from legal redress," the court will apply the " 'general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.' ") (citation omitted).[2]

Bell v. Hood concerned the remedies available to a plaintiff who sued for violations of his Fourth and Fifth Amendment rights. 327 U.S. at 679. Thus, the rule taken from that case arose in the context of constitutional causes of action. However, prior to *Bell v. Hood*, the same rule had been applied in a statutory context.

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[2] *See also Hayes v. Michigan Cent. R.R.*, 111 U.S. 228, 239-40 (1884) (when a person is injured due to the breach of a statutory obligation, the person "is entitled to his individual compensation, and to an action for its recovery"); *Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867) ("The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.").

See, e.g., Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916).[3] Since *Bell v. Hood* was decided, it has been applied to constitutional causes of action, *see, e.g., Davis*, 442 U.S. at 245; *Bivens*, 403 U.S. at 396-97; and to statutory causes of action, *see, e.g., Sullivan*, 396 U.S. at 239-40; *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 200-204 (1967); *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964); *United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960). In fact, *Bell v. Hood* has been recognized as the "usual rule" for determining the relief to which an aggrieved party is entitled. *Guardians Ass'n v. Civil Service Comm'n of New York*, 463 U.S. 582, 595 (1983) (opinion of White, J.).

The Court has recognized only one exception to the *Bell v. Hood* rule: Remedies available to an aggrieved plaintiff may be restricted when Congress has made clear that particular remedies may not be awarded. *Guardians*, 463 U.S. at 595 (opinion of White, J.); *Davis*, 442 U.S. at 246-47 (plaintiff entitled to recover compensatory damages because there is no "explicit" congressional declaration that this remedy is not available); *Wyandotte Transp.*, 389 U.S. at 200-204; *see Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979) ("Even settled rules of statutory construction could yield, of course, to persuasive evidence of a contrary legislative intent."). As these cases stress, affirmative congressional intent to deny a particular remedy must be shown before the *Bell v. Hood* rule is displaced. *See Wyandotte Transp.*, 389 U.S. at 199-204.[4]

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[3] *See also Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 207 (1944); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940); *Board of County Comm'rs v. United States*, 308 U.S. 343, 350 (1939); *Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 569-70 (1930).

[4] *Cf. Cannon*, 441 U.S. at 694 (in context of determining whether implied private right of action exists, "'it is not necessary to show an intention to *create* a private cause of action, although an explicit

The *Bell v. Hood* rule applies to this case, and mandates that compensatory damages be available in Title IX cases involving intentional discrimination. *First*, Petitioner's complaint invokes federally protected rights. One of the primary objectives of Title IX was to "provide individual citizens effective protection against" sex discrimination. *Cannon*, 441 U.S. at 704; *see also id.* at 694 ("Title IX explicitly confers a benefit on persons discriminated against on the basis of sex"). *Second*, private suits may be brought for violations of these rights. *Id.* at 689, 717. The only question remaining in this case is whether compensatory damages are available to one who proves an intentional violation of Title IX.[5] *Bell v. Hood* answers that "federal courts may use any available remedy to make good the wrong done." 327 U.S. at 684; *see also Guardians*, 463 U.S. at 624-25 (Marshall, J., dissenting); *Sullivan*, 396 U.S. at 239-40; *Wyandotte Transp.*, 389 U.S. at 200-204; *see Davis*, 442 U.S. at 239 ("[T]he question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.").

Under *Bell v. Hood*, unless Respondents can show a clearly stated legislative intent to the contrary, a federal court may award any appropriate remedy that vindicates the federal rights being asserted. *See Bivens*, 403 U.S. at 396; *Transamerica Mortgage*, 444 U.S. at 30 (White, J., dissenting) ("in the absence of any contrary

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purpose to *deny* such a cause of action would be controlling'") (emphasis in original) (quoting *Cort v. Ash*, 422 U.S. 66, 82 (1975)); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 79 (1978) (White, J., dissenting).

[5] In *Guardians*, "a majority of the Court expressed the view that a private plaintiff under Title VI could recover backpay." *Darrone*, 465 U.S. at 630. A majority of the *Guardians* Court also "agreed that retroactive relief is available to private plaintiffs for all discrimination, whether intentional or unintentional, that is actionable under Title VI." *Id.* at 630 n.9.

indication by Congress, courts may provide private litigants exercising implied rights of action whatever relief is consistent with the congressional purpose," and they "need not be restricted to equitable relief"). Because there is nothing in Title IX or in the legislative history surrounding its enactment that shows an explicit congressional intent to deny compensatory damages to victims of intentional discrimination in violation of Title IX, the rule of *Bell v. Hood* controls. *See Guardians*, 463 U.S. at 595 (opinion of White, J.); *Cannon*, 441 U.S. at 694; *Bivens*, 403 U.S. at 397; *Transamerica Mortgage*, 444 U.S. at 30 (White, J., dissenting).[6]

Especially strong indications of congressional intent to deny victims of intentional discrimination a damages remedy must be shown before the Court departs from the usual rule of *Bell v. Hood*. Compensatory damages are the normal remedy associated with violations of an individual's federally protected rights. *See Davis*, 442 U.S. at 245 (damages are normal remedy to redress violations of liberty interest); *see also Jett v. Dallas Indep. School Dist.*, 492 U.S. 701, 742 (1989) (Brennan, J., dissenting); *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment). Injunctive or declaratory remedies often provide victims with little or no redress against those who have intentionally violated their rights. *See Transamerica Mortgage*, 444 U.S. at 35 (White, J., dissenting) (without damages remedy, victims "have little hope of obtaining redress for their injuries"); *Butz v. Economou*,

[6] The absence of legislative history showing that Congress wished to deny victims of intentional discrimination a damages remedy is not surprising, since the statute itself indicates no such intent. As this Court noted when considering whether Title IX created a private right of action, "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous" on that same subject. *Cannon*, 441 U.S. at 694; *see also Transamerica Mortgage*, 444 U.S. at 18.

438 U.S. 478, 504 (1978) ("Injunctive or declaratory relief is useless to a person who has already been injured."). Respondents can show no clearly expressed congressional intent to deny victims of intentional discrimination their normal and most effective remedy—compensatory damages.

As the normal remedy for intentional discrimination, compensatory damages unquestionably promote the objectives of Title IX. The Court should reject the United States' argument to the contrary. *Cf.* Brief for the United States as Amicus Curiae in Support of the Petition for Writ of Certiorari at 18-19. The prohibitions of discrimination contained in Titles IX and VI focus directly on eliminating discrimination in programs that receive federal funds. *Cannon*, 441 U.S. at 704; *see also* 110 Cong. Rec. 7062 (1964) (Title VI; comments of Sen. Pastore); *id.* at 1540 (Title VI; comments of Rep. Lindsay); 117 Cong. Rec. 39,252 (1971) (Title IX; comments of Rep. Mink); 118 Cong. Rec. 5806-07 (1972) (Title IX; comments of Sen. Bayh). By arguing that the overriding purpose of Title IX was to fund educational institutions, the United States confuses the purpose of Title IX with the purposes of the appropriations acts that fund particular federal programs. Those are obviously two different questions. The purpose of Title IX was to eliminate the use of federal funds to support discriminatory practices and to provide citizens with effective protection against those practices. *Cannon*, 441 U.S. at 704. A compensatory damages remedy only *furthers* this purpose by deterring intentional violators from accepting federal funds and by making victims whole if intentional violations occur. *See Carlson v. Green*, 446 U.S. 14, 21 (1980) ("[i]t is almost axiomatic that the threat of damages has a deterrent effect").

The United States invites the Court to depart from its established jurisprudence by posing what is, in light of that jurisprudence, the wrong question. The United States

asks whether "Congress intended to provide private litigants with a right to recover damages under Title IX." Brief for the United States in Support of the Petition for Certiorari at 15. But that is not the issue under the Court's precedents. The *correct* question, as noted above, is whether Congress explicitly stated an intent to *deny* victims of intentional discrimination a damages remedy. *See Guardians*, 463 U.S. at 595 (opinion of White, J.); *Davis*, 442 U.S. at 246-47. It is in this respect that congressional intent is relevant under the rule of *Bell v. Hood*. Congress stated no such explicit intent, as we have shown.[7]

The United States incorrectly states the question before the Court because it misconstrues this Court's cases. *First*, in support of its argument that Congress must have shown an intent to create a damages remedy before damages may be awarded, it relies solely on cases and language of this Court concerning whether Congress intended to create a *cause of action*. *See* Brief for the United States in Support of the Petition for Certiorari at 14 & n.22.[8] Under the cases discussed above, affirmative congressional intent may be the touchstone in *creating* a cause of action, but it is relevant only in

[7] The United States' formulation of the issue would require Congress to be more specific in affording remedies under implied causes of action than under expressly created causes of action. *See Wyandotte Transp.*, 389 U.S. at 200-04; *see also Cort*, 422 U.S. at 82-83 & n.14. Indeed, the inquiry advanced by the United States could result in very little relief being available under the Title IX implied cause of action or other implied causes of action, since it is "hardly surprising" for there to be little explicit congressional intent regarding remedies when Congress did not explicitly create a cause of action. *See* Brief for the United States in Support of the Petition for Certiorari at 15.

[8] Of course, this Court already has ruled that Congress intended a private right of action to exist under Title IX. *Cannon*, 441 U.S. at 694 ("the history of Title IX rather plainly indicates that Congress intended to create" a private right of action).

determining whether to *deny* a particular remedy. *Guardians*, 463 U.S. at 595 (opinion of White, J.); *Davis*, 442 U.S. at 246-47. This approach reflects a sound understanding of the respective roles of Congress and the courts. Where Congress has created a right of action, it is traditionally for the courts to determine what remedy is most appropriate to redress a particular violation. *See Republic Steel Corp.*, 362 U.S. at 492 ("Congress has legislated and made its purpose clear; it has provided enough federal law . . . from which appropriate remedies may be fashioned even though they rest on inferences."). The rule of *Bell v. Hood* gives a court the full range of remedies from which to choose, unless Congress explicitly has provided otherwise.

Second, the United States misreads this Court's opinion in *Transamerica Mortgage*. It does so by, once again, applying in a remedies context language that the Court used in determining whether a cause of action existed. *Compare* Brief for the United States in Support of the Petition for Certiorari at 14 *with Transamerica Mortgage*, 444 U.S. at 15 ("The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction."). The Court in *Transamerica Mortgage*, consistently with the principles explained above, denied a damages remedy to plaintiffs in that case only after determining that extensive and persuasive legislative history, and the terms of the statute itself, showed a congressional intent to deny legal damages to aggrieved plaintiffs. 444 U.S. at 21-22, 29-30 & n.6; *see also Bush v. Lucas*, 462 U.S. 367, 374-75, 378 (1983); *Cort*, 422 U.S. at 82-83 & n.14. Congress expressed no such intent when it enacted Title IX. In fact, the opposite is true. *See, e.g.*, 110 Cong. Rec. 5256 (1964) (Title VI; comments of Sen. Case) (cutoff of funds remedy is "not intended to limit the rights of individuals, if they have any way of enforcing their rights apart from the provisions of the bill, by way

of suit or any other procedure. The [cutoff of funds remedy] is not intended to cut down any rights that exist.").[9] *Transamerica Mortgage*, therefore, is perfectly consistent with the framework advanced above and the result urged by Petitioner.[10]

Finally, the United States seems to advocate that the Court disregard its well-established rules of construction because the availability of compensatory damages under Title IX would "give rise to a curious anomaly in the civil rights acts." Brief for the United States in Support of the Petition for Certiorari at 17. Such an "anomaly" would arise, the United States asserts, because a Title IX plaintiff suing to redress sex discrimination would have broader remedies than a Title VI plaintiff suing to redress race discrimination. *Id.* In addition, the United States asserts that it would be "especially anomalous" if the remedies to enforce the implied cause of action under Title IX were broader than those expressly granted for employment discrimination in educational institutions, under Title VII.[11] *Id.* at 18 n.15.

[9] *Cannon* itself forecloses any argument that Congress intended only those administrative remedies explicitly provided in Title IX to be available to aggrieved plaintiffs. *Cannon*, 441 U.S. at 705.

[10] One of the United States' primary grounds for inferring a congressional intent to deny a damages remedy for intentional violations of Title IX is that, at the time Congress enacted Title IX, courts construing Title VI had awarded primarily equitable relief. Brief for the United States in Support of the Petition for Certiorari at 16-17. Of course, that would provide no basis for ascertaining congressional intent at the time Title VI was passed. Thus, to the extent the Court accepts the United States' novel argument that Congress must have intended to create a damages remedy before the courts may award damages, one of the United States' primary methods of "illuminating" congressional intent under Title IX sheds no light at all on the intended remedies under Title VI.

[11] It generally has been held that compensatory damages are not available under Title VII. *See, e.g., Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982); *Pearson v. Western Elec. Co.*, 542 F.2d 1150, 1151-52 (10th Cir. 1976).

The asserted anomalies provide no basis for abandoning the normal rules of construction. It is not at all clear that the remedies under Title IX and Title VI will differ if compensatory damages are made available for intentional violations of Title IX. The United States asserts that such a conflict will arise because persons alleging employment discrimination on the basis of race in a federally funded program generally are remitted to their equitable remedies under Title VII. Brief for the United States in Support of the Petition for Certiorari at 17. But this Court has never passed on that issue, which would involve interpretation of provisions in Title VI that have no counterpart in Title IX.[12] It would be putting the cart before the horse for the Court to reject the interpretation of Title IX that is dictated by established

[12] Title VI provides that:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. § 2000d-3 (1988). Title IX contains no analogous provision. The Court previously has noted this difference between Title VI and Title IX. *North Haven*, 456 U.S. at 529-30; *see also Darrone*, 465 U.S. at 631-34 & n.13. Of course, this difference does not suggest that compensatory damages should be available under Title IX but not under Title VI. It merely demonstrates that Congress itself intended Title IX to be somewhat broader in scope than Title VI. This intent of Congress is not anomalous or even surprising. Congress, in conjunction with Title VI, had enacted Title VII which dealt comprehensively with the national problem of race discrimination in employment. *See North Haven*, 456 U.S. at 536 n.26 ("this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination") (*citing International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236-39 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974)); *see also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

rules of construction, merely to pursue symmetry with a proposed interpretation of a Title VI provision on which this Court has never ruled.[13]

As to Title VII, the purported anomaly reflects simply a different congressional prescription for a different type of ill. Title VII focuses exclusively on employment, while Title IX focuses on avoiding the use of federal funds to support discriminatory practices and giving individuals "effective protection against those practices." *Cannon*, 441 U.S. at 704. As in this case, the damages inflicted by violations of Title IX may not be primarily economic. By prescribing equitable remedies in Title VII, Congress evidently determined that persons who have suffered economic injuries due to race discrimination in employment, generally in a private context, should not have the same breadth of remedies as individuals who have suffered intentional discrimination by recipients of federal funds.[14]

II. THERE ARE NO ELEVENTH AMENDMENT OR OTHER CONSTITUTIONAL CONCERNS THAT WARRANT RESTRICTION OF THE REMEDIES AVAILABLE UNDER TITLE IX.

To justify its denial of a damages remedy, the court of appeals relied heavily on certain principles of federalism, rooted in the Eleventh Amendment and related notions of State autonomy, that come into play in inter-

[13] In any event, an individual who sues for race discrimination in employment *is* entitled to recover compensatory damages under 42 U.S.C. § 1981. *See Johnson*, 421 U.S. at 460.

[14] Even if the United States had provided a persuasive rationale for changing the rule of construction as to remedies, which it has not, the Court should not apply a new and different rule with respect to statutes passed when the *Bell v. Hood* rule of construction applied. *See Welch v. Texas Highways & Pub. Transp. Dep't*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring in part); *Transamerica Mortgage*, 444 U.S. at 32 n.8 (White, J., dissenting); *Cannon*, 441 U.S. at 698 nn.22 & 23; *id.* at 718 (Rehnquist, J., concurring).

preting federal statutes enacted pursuant to the spending power. Without expressly saying so, the court below apparently concluded that those concerns warrant departure from the "usual rule" of *Bell v. Hood* in determining what remedies are available against State or local governments for violation of a federal spending power statute. That conclusion, we submit, was erroneous.[15]

The principles on which the court of appeals relied were developed by this Court in *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981). The Court there noted the contractual nature of Spending Clause[16] enactments and the fact that such enactments frequently impose substantial financial and administrative burdens on State and local governments. Where Congress seeks to impose "*affirmative* obligations" on the States under its spending power, the Court concluded that it must do so clearly and unambiguously. *See Pennhurst*, 451 U.S. at 16-17 (emphasis in original).[17]

[15] The court of appeals also relied on the decision of the former Fifth Circuit in *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129 (5th Cir. 1981), which rejected a claim for backpay under Title VI. This was error. After *Drayden* was decided, this Court unanimously ruled that a victim of intentional employment discrimination at the hands of a recipient of federal financial assistance may recover backpay as compensation. *Darrone*, 465 U.S. at 630-31. Thus *Drayden*'s rejection of any "right to recover backpay or other losses," and its sweeping assertion that the "private right of action allowed under Title VI encompasses no more than an attempt to have any discriminatory activity ceased," 642 F.2d at 133, have no current vitality.

[16] The Spending Clause, U.S. Const. art. I, § 8, cl. 1, states that Congress "shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States."

[17] The *Pennhurst* Court found support for its contractual analysis of Spending Clause legislation in Justice Cardozo's opinion for the Court in *Steward Machine Co. v. Davis*, 301 U.S. 548, 585-98 (1937). In *Steward Machine*, the Court upheld the constitutional validity of the federal Social Security tax system over the complaining tax-

Applying these principles in *Guardians*, 463 U.S. at 596-97, Justice White (joined by Chief Justice Rehnquist) expressed the view that only a prospective injunction should issue against a municipality whose hiring criteria were found to have excluded a disproportionate number of minority applicants, allegedly in unintentional violation of Title VI. Justice White reasoned that, in a case of unintentional discrimination, the defendant cannot properly be said to have violated the contractual conditions placed on its receipt of federal funds until such time as a court has identified the discriminatory impact of its conduct and announced what further costs and obligations it must undertake in order to comply with the law. He concluded that retrospective relief is inappropriate under those circumstances, because the recipient of funds—presented, for the first time, with a clear statement of the duties that it must assume should it continue to accept federal monies—is entitled to make an informed choice: The recipient may reject the contractual conditions by withdrawing from the federal assistance program entirely, *see Rosado v. Wyman*, 397 U.S. 397, 420-21 (1970), or it may "voluntarily and knowingly" accept those conditions, "cognizant of the consequences of [its] participation" in the program, *Pennhurst*, 451 U.S. at 17. Finally, Justice White noted that the analysis he derived from *Pennhurst* and *Rosado* was roughly analogous to the Eleventh Amendment's general prohibition against retroactive relief in a federal-court action against a State official. *See Guardians*, 463 U.S. at 604 (citing *Edelman v. Jordan*, 415 U.S. 651, 665-67 (1974)).

Five members of the Court disagreed with the remedial limitations proposed by Justice White, arguing that the

payers' objection that Congress, by conditioning certain grants to the States on their own enactment of unemployment compensation laws, had resorted to "coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government." *Id.* at 585.

Eleventh Amendment was inapplicable and that *Pennhurst*—itself an outgrowth of State sovereign immunity doctrine—addresses only the specificity with which Congress must legislate under the Spending Clause in order to create rights that are judicially enforceable against the States, and does not limit the remedies available when those rights have been violated.[18] Justices Stevens, Brennan, and Blackmun, as well as Justice Marshall in a separate opinion, rejected any inflexible rule limiting the remedies available under Title VI. *See Guardians*, 463 U.S. at 628-33, 636-38. Justice O'Connor, for the same reasons, rejected the proposed distinction between prospective and retrospective equitable relief, but found it unnecessary to address the availability of monetary damages, *see id.* at 612 & n.1, because she concluded that no violation of law had been established. And Justices White and Rehnquist cautioned that a *Pennhurst* contractual analysis might well lead to the opposite result in a Title VI case involving intentional discrimination, where there is "no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation." *Id.* at 597. In such situations, "it may be that the victim of the intentional discrimination should be entitled to a compensatory award . . . ." *Id.*

Pennhurst does not, as the court of appeals believed, prohibit the relief sought here.[19] Respondents' alleged

[18] The majority's disagreement with Justice White over the meaning and limits of *Pennhurst* mirrors the debate that divided the Seventh Circuit panel in *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982). *See id.* at 1189-92 (Swygert, S.J., dissenting).

[19] The court of appeals assumed that "Title IX, like Title VI, is Spending Clause legislation," Cert. Pet. App. 11, and therefore found "important guidance" in Justice White's application of Spending Clause principles in *Guardians*. But in *Guardians* the parties had not briefed the question of Title VI's constitutional origins, because

violation lies not in any failure to predict what hidden obligations and duties a court might declare to be implicit in Title IX, *cf. Guardians*, 463 U.S. at 597, but in a willful disregard of a clear and unambiguous statutory command. Where a recipient of federal funds has intentionally violated the unequivocal congressional mandate

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they, like the Congresses that enacted Title VI and Title IX, had no reason to anticipate that the answer to that question would affect the availability of particular remedies. In fact, there is compelling evidence that the 88th Congress enacted Title VI pursuant to Section 5 of the Fourteenth Amendment as well as its Article I power to spend for the general welfare. *See* 110 Cong. Rec. 1529 (1964) (Rep. McCulloch) ("[T]he Federal Government, through Congress, certainly has the authority, pursuant to the 14th amendment, to withhold Federal financial assistance where such assistance is extended in a discriminatory manner."); H.R. Rep. No. 914, 88th Cong., 1st Sess. pt. 2, at 1 (1963) ("[N]ot since Reconstruction has Congress enacted legislation fully implementing the [Fourteenth Amendment]. A key purpose of the bill, then, is to secure to all Americans the equal protection of the laws of the United States and the several states."); 110 Cong. Rec. 1527 (1964) (Rep. Celler) (suggesting that, although Title VI is undoubtedly valid as an exercise of the spending power, the Fifth and Fourteenth Amendments may of their own force prohibit the expenditure of public funds to support discriminatory programs and activities); *id.* at 13,333 (Sen. Ribicoff) (stating that Title VI enacts procedures for enforcing the Fourteenth Amendment). *See also Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 285-87 (1978) (opinion of Powell, J.).

There are many reasons, including the evolutionary nature of constitutional doctrines, that might lead Congress to invoke more than one of its constitutional powers in enacting civil rights or other remedial legislation. *See* Note, *The Eleventh Amendment and State Damage Liability Under the Rehabilitation Act of 1973*, 71 Va. L. Rev. 655, 679 & nn.174-77 (1985) ("Because at the time the [1964] Civil Rights Act was drafted, Congress could enforce the fourteenth amendment only against state governments, Congress applied Title VI to private recipients of federal aid through its broad article I powers.") (citing, *inter alia*, *The Civil Rights Cases*, 109 U.S. 3 (1883)). For the courts to limit the reach of a statute based on their judgment as to the predominant source of constitutional power invoked would effectively deny Congress its ability to base legislation on more than one.

accompanying those funds, the recipient should be held to the terms of its bargain and should "make whole" the victim of its misconduct.[20] The time for the recipient to shed an unwanted obligation not to discriminate, and to avoid liability for an intentional breach of that obligation, has long since past.

Pennhurst also does not control the result here because, three years after the Court decided *Guardians*, Congress explicitly rejected the importation of Eleventh Amendment principles into Title IX litigation. In the Civil Rights Remedies Equalization Act of 1986 ("Remedies

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[20] The United States, as *amicus curiae*, posits a distinction between permissible and impermissible make whole relief that turns on whether the relief "would threaten 'a potentially massive financial liability'" or whether, instead, it "'merely requires the [defendant] to belatedly pay expenses that it should have paid all along.'" Brief for the United States in Support of the Petition for Certiorari at 19 & n.17 (citations omitted). That distinction would, for no apparent reason, elevate the State sovereignty concerns noted in *Pennhurst* (*e.g.*, that a court should not lightly require the States to assume "open-ended and potentially burdensome obligations," 451 U.S. at 29) into a free-standing rule of statutory construction favoring restitutionary remedies over legal damages. There is no valid basis for such a rule. This Court's Eleventh Amendment cases draw no distinction between compensatory damages and restitution of benefits wrongly withheld. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976) (an award of retroactive retirement benefits is a "damages award"). Nor does any such distinction follow, as the United States suggests, from Title IX's references to voluntary compliance with the law.

As the United States correctly notes, Title IX by its terms prohibits three distinct forms of misconduct by recipients of federal aid. *See* Brief for the United States in Support of the Petition for Certiorari at 15-16. A wrongful "exclusion from participation" may sometimes be cured by a prospective injunction, and an unlawful "denial of benefits" may sometimes be cured by relief in the nature of restitution. But the rule proposed by the United States would often provide no judicial remedy at all for having been "subjected to discrimination" in violation of Title IX. Such a gap in the statute's coverage would be wholly irrational.

Act"),[21] Congress not only eliminated any grounds for withholding retroactive relief under Title IX, but also rejected any distinction between legal and equitable relief.

Congress enacted the Remedies Act as part of the Rehabilitation Act Amendments of 1986, in response to this Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).[22] The Act contains two substantive provisions. The first, 42 U.S.C. § 2000d-7(a)(1), withdraws the Eleventh Amendment immunity of the States under Title IX and related statutes. The second, 42 U.S.C. § 2000d-7(a)(2), goes further. Eschewing any distinction between legal and equitable relief under Title IX, the Remedies Act clarifies that, in a Title IX suit against a State, a federal court may provide "remedies both at law and in equity":

> In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.[23]

Congress obviously understood that remedies "at law" are available under Title IX, and acted to ensure that

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[21] Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (1986) (codified at 42 U.S.C. § 2000d-7 (1988)).

[22] In *Atascadero*, the plaintiff sought "retroactive monetary relief" for an allegedly discriminatory refusal to hire—apparently the same equitable remedy approved in *Darrone*, 465 U.S. at 631—against two agencies of the State of California. This Court held the claim barred by the Eleventh Amendment.

[23] 42 U.S.C. § 2000d-7(a)(2) (1988). The statutes "referred to in paragraph (1)" of this subsection are Section 504 of the Rehabilitation Act, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975 (42 U.S.C. § 6101 *et seq.*), Title VI of the Civil Rights Act of 1964, and "the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." None of the enumerated statutes textually provides a damages remedy.

those remedies will be available against public as well as private defendants. If, as Respondents here contend, remedies "at law" are never available under Title IX, then the language chosen by Congress is effectively deleted from the statute. Such a result is strongly disfavored. *See Rosado*, 397 U.S. at 415 ("courts should construe all legislative enactments to give them some meaning"); *United States v. Menasch*, 348 U.S. 528, 538-39 (1955) (courts should "give effect, if possible, to every clause and word of a statute"); 2A N.J. Singer, *Sutherland Statutory Construction* § 46.06, at 104 (4th ed. 1984).

The legislative history of the Remedies Act further confirms that Congress understood that the federal courts were, and intended that they remain, free to provide a damages remedy under Title IX. Congress had assumed, before *Atascadero*, that money damages were available against the States, and *a fortiori* that money damages were available against other public entities and private parties. Thus, when Congress acted to "equalize" the remedies available against the States, it did so by "explicitly provid[ing] that in a suit against a State for a violation of any of these statutes, remedies, *including monetary damages*, are available to the same extent as they would be available for such a violation in a suit against any public or private entity other than a State." S. Rep. No. 388, 99th Cong., 2d Sess. 28 (1986) (emphasis added).[24]

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[24] If, as the court of appeals believed, the Remedies Act "*only* eliminates the sovereign immunity of States under the eleventh amendment," Cert. Pet. App. 10 (emphasis added), then the entire text of paragraph (a)(2) of the Act is simply read out of the statute. *Compare* 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment . . . .") *with id.* § 2000d-7(a)(2) ("remedies (including remedies both at law and in equity) are available . . . ."). The Senate Report confirms that paragraph (a)(2) was intended to have independent significance. *See* S. Rep. No. 99-388, at 28 ("[T]he Rehabilitation Act Amendments of 1986 provide that states shall not be immune under the Eleventh Amendment from suit in Federal court. . . . Section 1003 also explicitly provides that

Senator Cranston, the author of the Remedies Act, voiced its underlying premise—the need for a federal damages remedy—quite plainly in explaining the urgency of its enactment.[25] He explained that the result in *Atascadero* was unacceptable because it left victims of discrimination by the States with only two choices: a "federal suit for an injunction against individual State officials" or "a suit in State court *for damages*." 132 Cong. Rec. 28,623 (1986) (emphasis added). He then cogently explained how the federal courts' inability or refusal to

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in a suit against a State for a violation of any of these statutes, remedies, including monetary damages, are available [against the State] . . . .").

Moreover, if Respondents' view were to prevail, then the 99th Congress, despite its reference to "remedies both at law and in equity," accomplished no more than to make retroactive equitable relief available in private actions in federal courts against the States; prospective relief was already available through the simple expedient of suing the responsible State official rather than the State itself, under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *See Edelman v. Jordan*, 415 U.S. 651, 664 (1974) (State official prospectively enjoined to comply with federal regulations). Congress plainly believed that it was accomplishing more than this.

[25] The Remedies Act was incorporated into Title X of the Rehabilitation Act Amendments of 1986 after being offered as an amendment to the Senate bill by Senator Cranston. *See* S. Rep. No. 99-388, at 27. The original House bill (H.R. 4021) contained no comparable provision, but Senator Cranston's language was adopted by the Conference Committee without any material change, and the House passed the resulting version of H.R. 4021 containing Senator Cranston's provision by a vote of 408-0. *See* 132 Cong. Rec. 28,094-95 (1986).

Because the Conference Committee Report does not refer to Senator Cranston's amendment except to clarify its effective date, *see* H.R. Conf. Rep. No. 955, 99th Cong., 2d Sess. 78-79 (1986), and because the bill originally reported by the House Education and Labor Committee contained no equivalent provision, the only contemporaneous explanations of Congress's choice of the words "remedies both at law and in equity" are those in the Senate Report and those offered on the Senate floor by Senator Cranston, the amendment's author and primary sponsor.

award damages would thwart the remedial objectives of the civil rights laws:

> As to the limit on Federal remedies, litigation involving a claim of discrimination often takes years to resolve. Thus, where the [victim] is seeking employment or is trying to pursue an education or to participate in a project having only a 2- or 3-year life, an injunction may come too late to be [of] value in remedying the harm done through the unlawful discrimination. In a very real sense, the availability of only injunctive relief postpones the effective date of the antidiscrimination law, with respect to a State agency, to the date on which the court issues an injunction because there is no remedy available for violations occurring before that date.

Id. That is the unacceptable result that Congress sought to foreclose when it enacted the Remedies Act. Yet it is exactly the result that would follow from the court of appeals' holding in this case.

The United States offers a contrary reading of Senator Cranston's explanatory statement. Truncating his remarks beyond recognition, the Government asserts that Senator Cranston "carefully reserved" the question whether damages are available under Title IX. Brief for the United States in Support of the Petition for Certiorari at 20 n.18. That assertion is baffling. If the Senator did not believe that legal damages were recoverable against private parties, why then did he assume them to be recoverable against the States in their own courts? And if Congress did not intend that full retroactive relief be made available to victims of unlawful discrimination, why then did it reject the States' constitutional immunity as impermissibly "postpon[ing] the effective date of the antidiscrimination law"?

The Government's casual dismissal of the Remedies Act not only turns Senator Cranston's statement on its head, but also undermines the Government's own professed goal of effectuating the intent of Congress. If

the Remedies Act does nothing more, it forcefully demonstrates Congress's intent that the full range of the federal courts' remedial powers be available to compensate victims of unlawful discrimination. In the Remedies Act, Congress acted to overcome a constitutional barrier that prevented the courts from awarding damages under Title IX. If another barrier is to be erected, it cannot be done in the name of congressional intent.

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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